(3)

No. 88-50

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KALIMA JENKINS, et al.,
Petitioners,

vs.

STATE OF MISSOURI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM L. WEBSTER
Attorney General
TERRY C. ALLEN
Deputy Attorney General
MICHAEL L. BOICOURT
(*Counsel of Record*)
Assistant Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
314-751-3321
Counsel for Respondents

R. L. MIDKIFF, Inc., 916 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Whether 42 U.S.C. § 1988 entitles counsel for plaintiffs who prevail on certain claims against certain defendants in a public school desegregation case to a "contingency enhancement" as a separate element in an award of attorneys' fees, over and above the hourly rate that the district court found to be reasonable under the circumstances, after an evidentiary hearing that included expert testimony on the manner in which the local and national markets in attorneys' rates reflect compensation for the risk of nonrecovery, as well as testimony relevant to the likelihood that other counsel would have been available to the plaintiffs.

LIST OF PARTIES

Respondents accept the petitioners' list of parties.

TABLE OF CONTENTS

QUESTION PRESENTED I
LIST OF PARTIES II
TABLE OF AUTHORITIES V
STATEMENT OF THE CASE 1
ARGUMENT 5

I. In its opinion resolving the "contingency enhancement" issue against the petitioners, the court of appeals took account of this Court's decision in *Delaware Valley II*, and found that under none of the theories espoused by this Court would the petitioners' counsel be entitled to a bonus, multiplier, or enhancement over and above the lodestar fee on account of any pretended "risk of nonpayment" in the underlying case 5

A. Plaintiffs were not prejudiced by the intervention in time of this Court's decision in *Delaware Valley II* between the district court's hearing and initial order concerning attorneys' fees, on the one hand, and its denial of reconsideration and the appeal of its fee orders, on the other, because they cannot meet a necessary condition of any "contingency enhancement" under *Delaware Valley II*, *i.e.*, a showing that without the enhancement they seek, they would have been unable to attract counsel 8

B. The market approach suggested in the *Delaware Valley II* concurrence does not

require an equation of awards of attorneys' fees under federal fee-shifting statutes to hypothetical hourly rates recovered by attorneys handling private-law cases on a contingent-fee basis 12

C. That the district court heard various contingent-fee attorneys and law-practice economists testify about their fee-setting practices and those they believed to be common in the Kansas City area and throughout the nation, and subsequently found that its lodestar rates for Mr. Benson and his staff adequately compensated him for the risk of nonpayment in the underlying case, provides a sufficient basis for leaving undisturbed the judgment of the district court and the opinion of the court of appeals in respect to the denial of a separate contingency enhancement 14

II. Petitioners exaggerate the uncertainty, if any, created by this Court's *Delaware Valley II* decision in respect to the means by which risk of nonpayment may be considered, in appropriate cases, in setting statutory attorneys' fees for prevailing parties 15

A. Assuming arguendo the existence of any conflict between certain circuits concerning the issue on which the petitioners seek a writ of certiorari, this case would not provide an appropriate vehicle for "resolving" the alleged differences, because the court of appeals panel that

heard their appeal and affirmed the judgment of the district court was in one of the circuits whose general position on this issue the petitioners endorse 15

B. The cases cited by the petitioners as evidence of a conflict among the circuits on this issue do not in fact reflect conflicts between decisions, only a variety in the expression of the rationales of the "minority" courts of appeals, as well as differences of fact between the cases decided by them after this Court's decision in *Delaware Valley II* 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987) 20

Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295 (2d Cir. 1987) 19

Jacobs v. Mancuso, 825 F.2d 559 (1st Cir. 1987) 18, 19, 20

Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo.), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 70 (1987) 2

Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 70 (1987) 1-2

Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo.) 2

Lewis v. Coughlin, 801 F.2d 570 (2d Cir. 1986) 7, 19

Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) 20

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078 (1987) (*Delaware Valley II*) ..... 4, 5 et passim

School District of Kansas City, et al. v. Missouri, et al., 460 F. Supp. 421 (W.D. Mo. 1978) 8, 9

Statutes

33 U.S.C. § 1365(d) 19

42 U.S.C. § 1983 9

42 U.S.C. § 1988 ..... 1, 2

42 U.S.C. § 7604(d) 6

Rules

Fed. R. Civ. P. 26-37 10

Treatise

Harvard Law Review Association, A Uniform System of Citation (14th ed. 1986) 18

RESPONDENTS' BRIEF IN OPPOSITION

The State of Missouri; the Hon. John D. Ashcroft, Governor; Robert Bartman, Commissioner of Education; and the State Board of Education, Roseann Bentley, Dan Blackwell, Terry A. Bond, Roger L. Tolliver, Raymond McCallister, Jr., Susan D. Finke, Thomas R. Davis, and Cynthia B. Thompson, Members—the respondents herein—respectfully request that this Court deny the petition for writ of certiorari filed by the plaintiffs below, seeking review of that portion of the opinion of the United States Court of Appeals for the Eighth Circuit denying the plaintiffs' appeal from the district court's denial of a "contingency enhancement" to the fees awarded to their counsel and his staff. The opinion of the Court of Appeals is reported at 838 F.2d 260.

STATEMENT OF THE CASE

In 1977 the Kansas City, Missouri, School District (hereinafter "KCMSD") and certain of its students filed a civil action in the United States District Court for the Western District of Missouri, alleging unlawful segregation according to color in the public schools of the greater Kansas City area. Their complaint alleged that officials, officers, and agencies of the federal government, the States of Missouri and Kansas, and various suburban school districts "had caused or had been part of a system of racial segregation among Kansas City metropolitan area school districts." *Jenkins v. Missouri*, 807 F.2d 657, 661

(8th Cir. 1986), *cert. denied*, 108 S.Ct. 70 (1987). In October 1978 the district court dismissed the action as against the Kansas defendants for want of jurisdiction, and realigned KCMSD—one of the parties that brought the action—as a defendant. *Ibid.* Subsequently KCMSD filed a crossclaim against the State defendants. Petitioners' Appendix (hereinafter "Pet. App.") 75a.

Plaintiffs' present local counsel, Arthur A. Benson II, began representing the plaintiffs no later than March 15, 1979. Pet. App. 12a; *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo.), Docket Sheet at 29, Doc. No. 1 (entry of appearance). On May 20, 1979, the plaintiffs filed an amended complaint against the suburban and federal defendants as well as the State defendants, alleging both an interdistrict violation and an intradistrict violation, and seeking an interdistrict remedy. *Id.*, Doc. No. 22. In March 1982 the Legal Defense Fund of the National Association for the Advancement of Colored People (hereinafter the "Fund") joined Mr. Benson as counsel for the plaintiffs. Pet. App. 65a. In June 1985, the district court found that the federal and suburban defendants were not liable, and denied an interdistrict remedy; it found KCMSD and the State defendants liable on the basis of past acts and omissions, and began the process of formulating and implementing an intradistrict remedy. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo.), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 70 (1987).

Plaintiffs' counsel moved for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. On behalf of himself and his staff, Mr. Benson sought $3,310,587.00, Pet. App. 43a, which he later increased by $52,781.45, Pet.

App. 93a, for a total of $3,363,368.45. Of this sum, Mr. Benson claimed $1,135,800.00 for himself, Pet. App. 54a, $319,328 and $287,912 for two associates, Pet. App. 58a-59a, and additional sums in respect to other staff, Pet. App. 59a-61a—an amount in excess of $1,743,040.00—as an "enhancement" of his fees under section 1988 for the "risk of nonpayment" associated with his representation of the plaintiffs. (By contrast, the NAACP Legal Defense Fund, Inc., sought a contingency enhancement of $688,874.30, Pet. App. 71a, out of a total request of $3,170,600.20, Pet. App. 65a. Thus, whereas both Mr. Benson and the Fund, Inc., requested about the same amount overall, Mr. Benson requested over $1.7 million as a risk enhancement, whereas the Fund, Inc., requested less than $700,000.) KCMSD also sought attorneys' fees on the basis of its having prevailed in its crossclaim against the State defendants. Pet. App. 75a. On February 27, 1987, the district court held an evidentiary hearing on the plaintiffs' and their ally's motions for attorneys' fees, at which several attorneys and economists testified concerning the market value of Mr. Benson's services, in light of the billing practices in the Kansas City area at the time of the litigation on the merits. Petition at 9, 11-16 (citing and quoting transcript).

In an unpublished Order dated May 11, 1987, the district court rejected Mr. Benson's claim of a separate "enhancement" for himself and his staff, finding that the "small risk of nonpayment" for their services was "fully reflected in the reasonable attorney's fee calculated by the Court." Pet. App. 57a, 59a & 60a. This rate was two hundred dollars ($200) per hour. Pet. App. 53a. By its Order of May 11, 1987, therefore, the district court

awarded Mr. Benson and his staff $1,614,437.43 in fees and expenses, Pet. App. 85a, which it augmented in its unpublished Order of July 14, 1987, by $42,090.45, Pet. App. 95a, for a total of $1,656,527.88. The district court denied attorneys' fees to KCMSD, Pet. App. 79a and 86a, noting that the District had been adjudicated a constitutional violator in the same action, Pet. App. 78a; that KCMSD had originally been a plaintiff in the action, was only involuntarily made a defendant, "cooperated closely [with the plaintiff class] in the development and prosecution of the litigation," and "actually acknowledged prior to trial that it had violated the constitutional rights of the plaintiffs," Pet. App. 83a; and that in its cross-claim, KCMSD "simply reiterated the allegations of the plaintiffs . . . ," Pet. App. 75a.

Plaintiffs requested reconsideration of the district court's order insofar as it denied the separate "enhancement" in question, and the district court denied reconsideration by an Order dated July 14, 1987—*after* this Court's announcement of its decision on June 26, 1987, of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) (hereinafter *"Delaware Valley II"*).

Most parties to the action in the district court appealed this resolution of the attorneys' fees issues. Both the plaintiffs below and the respondents addressed the issue whether *Delaware Valley II* required any re-examination of the district court's fee orders. On the issue before this Court in the plaintiffs' petition—as on all others—the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court. Pet. App. 42a. It observed that this Court had rendered its

decision in *Delaware Valley II* after the district court had issued its opinion on the attorneys' fees. Pet. App. 38a. The court of appeals resolved this specious difficulty by finding—based on its review of the record below—that under none of the theories advanced in the opinions of this Court in *Delaware Valley II* would Mr. Benson and his staff be entitled to a "contingency enhancement." Pet. App. 38a-42a.

This petition followed.

ARGUMENT

I. In its opinion resolving the "contingency enhancement" issue against the petitioners, the court of appeals took account of this Court's decision in Delaware Valley II, **and found that under none of the theories espoused by this Court would the petitioners' counsel be entitled to a bonus, multiplier, or enhancement over and above the lodestar fee on account of any pretended "risk of nonpayment" in the underlying case.**

In the instant case, one of the attorneys for the plaintiff class in a school desegregation case—having received an award of over $1.7 million in attorneys' fees—appeals from the decision of the court of appeals affirming the trial court's judgment denying him an additional $1.7 as a "contingency enhancement."

A unique circumstance in this case is that the district court made the contested decision on attorneys' fees on

June 14, 1987, twelve days before this Court announced its opinion in *Delaware Valley II*, setting forth certain criteria for the grant or denial of contingency enhancements under federal fee-shifting statutes. On July 14, 1987, however—eighteen days after this Court's decision in *Delaware Valley II*—the district court denied in pertinent part the plaintiffs' motion to alter or amend. Respondents assume that at some point during this eighteen-day period, the petitioners' counsel must have learned of this Court's decision and could have brought to the district court's attention any argument based on it that he believed would support the motion to alter or amend. In the briefs on the subsequent appeal, the parties addressed the application of *Delaware Valley II* to the instant case at some length, and the court of appeals discussed it explicitly in its decision affirming the judgment of the district court.

In *Delaware Valley II*, plaintiff had obtained an award of attorneys' fees under 42 U.S.C. § 7604(d), *i.e.*, section 304(d) of the Clean Air Act, for the work of their attorneys in securing the implementation of a consent decree between the plaintiffs and the Commonwealth of Pennsylvania. In calculating the award, the district court had doubled the lodestar for certain phases of the attorneys' work as a "contingency enhancement," and the court of appeals had affirmed.

This Court reversed the decision of the court of appeals. In the opinion of the Court on some points and a plurality opinion on others, Justice White stated (for the plurality):

> Before adjusting for risk assumption, there should be evidence in the record, and the trial court should

> so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market. Here there were no such findings.
>
> Accordingly, the judgment of the Court of Appeals is *Reversed.*

107 S.Ct. at 3089 (footnote, citing *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986), omitted).

Justice O'Connor delivered a separate opinion, concurring in part and concurring in the judgment. In common with the plurality, she stated that "a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." *Id.* at 3091 (concurring in part and concurring in the judgment). Four Justices dissented, believing that the plurality "ignore[d] the fact that a fee that may be appropriate in amount when paid promptly and regardless of the outcome of the case may be inadequate and inappropriate when its payment is contingent upon winning the case." *Ibid.* (Blackmun, J., dissenting). Justice O'Connor agreed with the dissenters that a contingency enhancement should sometimes be awarded, and that "compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case," *id.* at 3089; but because she found that the district court had not made findings which would support an award of a contingency enhancement, she agreed with the plurality that the judgment in the case before the Court should be reversed.

A. Plaintiffs were not prejudiced by the intervention in time of this Court's decision in Delaware Valley II **between the district court's hearing and initial order concerning attorneys' fees, on the one hand, and its denial of reconsideration and the appeal of its fee orders, on the other, because they cannot meet a necessary condition of any "contingency enhancement" under** Delaware Valley II, i.e., **a showing that without the enhancement they seek, they would have been unable to attract counsel.**

In the concurring opinion of Justice O'Connor and in the plurality opinion of Justice White in *Delaware Valley II*, the Court established as a necessary condition of awarding a risk enhancement the requirement that the party seeking fees must show "that without the adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" 107 S.Ct. at 3091 (concurring opinion), quoting *id.* at 3089 (plurality opinion).

Petitioners cannot credibly argue that they could not have obtained counsel without such an adjustment, because other counsel was in fact representing the plaintiffs—not the same individuals, to be sure, but plaintiffs nonetheless—from before Mr. Benson's entry of appearance. *School District of Kansas City, et al. v. Missouri, et al.*, 460 F. Supp. 421, 426 (W.D. Mo. 1978). Mr. Benson came on the scene after KCMSD had been involuntarily and formally realigned as a defendant—when it was one of the parties that had initially sought to have the State of Missouri and various other entities and persons held

liable for interdistrict segregation and ordered to provide an interdistrict remedy for it. *Id.* at 442, 445. It strains credulity to argue that no one—no zealous or ambitious attorney whose existing commitments did not preclude such a task—would have undertaken to serve as "co-operating counsel" for the NAACP, Petition at 13-14, in this case.

What is even more unlikely is that no attorney would have come forward without the assurance of a bounty of the proportions now sought by Mr. Benson, when the statutes and case law in force at the time made no such commitment. Mr. Benson went into this litigation without a legislative or judicial promise of *any* "contingency enhancement" at all—only a "reasonable" fee if his clients prevailed. There was no evidence at the fees hearing or otherwise in the record that the plaintiffs—let alone Congress or the federal courts—induced Mr. Benson to prosecute this litigation by any offer of a $1.7 million premium over and above the "reasonable" fees and expenses provided for prevailing parties under 42 U.S.C. § 1983. State respondents are unaware of record evidence of any reliance, reasonable or otherwise, on such a bounty.

It is impossible to evaluate the asserted difficulty that the plaintiffs would have had in obtaining counsel in this case but for the bait of a contingency enhancement without considering their strategic and tactical position at the time Mr. Benson entered his appearance. Consequently, a consideration of this factor in *Delaware Valley II* necessarily entails inquiry concerning the alleged "risk" involved in the particular underlying case, whether or not such alleged risk is to be taken into account as a separate factor. Such an inquiry deals with the practical risk that

would be entailed by an attorney's taking the case, as distinguished from the "legal" risk of nonrecovery in the abstract.

In arguing that the district court and the court of appeals erred in not ordering the State to pay Mr. Benson an extra $1.7 million, the plaintiffs exaggerate the practical "risk" of receiving no payment at all that he undertook in prosecuting their case. From the first stages of the litigation—*before* he came on as counsel for the plaintiffs—the baseline constitutional violator, KCMSD, had effectively admitted that there was unconstitutional discrimination against the children it was charged to educate. It had both physical control and working knowledge of the documents, tangible things, and other evidence that a plaintiff's lawyer would ordinarily have a difficult time obtaining through the normal operation of Fed. R. Civ. P. 26-37. Rather than resisting the plaintiffs' claims, KCMSD filed a crossclaim against the State defendants—seeking to cast the blame for violations within its jurisdiction on the State and on the suburbs surrounding Kansas City, in an unsuccessful attempt to obtain an interdistrict remedy. In light of the open collaboration of this key player, it is a wonder that Mr. Benson could have spent as much as he did—and could have taken as long as he has taken—to achieve the partial success which he would have this Court regard as so "exceptional." Petition at 31.

In making their argument for another $1.7 million, the plaintiffs say that Mr. Benson went into debt by more than $730,000 in order to finance the underlying litigation. Petition at 32. As is true of any other aspect of the case, of course, no one forced him to go to this extreme. But with respect to the allegation that other counsel would

not have come forward but for the promise of a "contingency enhancement" of over 100% of the amount the district court and the court of appeals found reasonable *taking into account the risk of nonpayment*, one must wonder how risky Mr. Benson's creditors considered the underlying case.

Although the record is scant on the indebtedness allegedly incurred, it is reasonable to assume that the average person or institution with three-quarters of a million dollars to lend will have the means and motive to check out the enterprise which is supposed to provide the repayment of the principal. If Mr. Benson could obtain such a large loan using his expectancy of a fee award in the underlying case as collateral, it stands to reason that other counsel could also have been obtained—perhaps counsel who would have sought and obtained the support of the NAACP Legal Defense Fund, Inc., sooner and to a greater degree. Although some of the plaintiffs' experts testified that they would not have taken the case themselves, or that it is generally difficult to find attorneys to handle school desegregation cases, Petition at 12-14 (citing transcript), there was no evidence that a single attorney turned down the plaintiffs in this case.

Consequently, no such bounty was necessary to attract counsel in this case. There is therefore no proximate cause between the district court's decision not to award a contingency enhancement separate from the fees and expenses it found to be reasonable and any hypothetical inability of these plaintiffs or future plaintiffs to obtain counsel. To award one now would be to give Mr. Benson a windfall profit of more than $1.7 million over and above the $1.7 million already found to be "reasonable" by the district court and the court of appeals.

B. The market approach suggested in the Delaware Valley II concurrence does not require an equation of awards of attorneys' fees under federal fee-shifting statutes to hypothetical hourly rates recovered by attorneys handling private-law cases on a contingent-fee basis.

Justice O'Connor's concurrence observes that "[t]he private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff," but in the next sentence recognizes that "[i]n most fee-shifting cases . . . the private market model of contingency compensation will provide very little guidance." 107 S.Ct. at 3089-90. One of the ways in which the analogy between contingent-fee personal injury cases and public law actions in which fee-shifting provisions are common breaks down is that in many of the latter cases, the plaintiffs' "goal is to secure injunctive relief to the exclusion of any claim for damages." *Id.* at 3087 (plurality opinion). In such cases, the amount that must be spent by one or more defendants to fund a remedy may overstate or understate the degree of benefit received by the plaintiffs as a result of their attorneys' efforts, and would therefore be a misleading basis for calculating fees under the appropriate statute.

The concurrence proceeds to suggest that the district courts and courts of appeals "treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market." *Id.* at 3090 (O'Connor, J., concurring in part and concurring in the judgment). This point is perfectly consistent with the treatment of cases under federal fee-shifting statutes as

sui generis—*i.e.*, a class of cases analogous to but not the same as contingent-fee cases handled independently of these statutes. It would indicate that the contingency enhancement, if any, in one case should not vary substantially from that in previous fee-shifting cases before the same court or other courts.

Under this analysis, the relevant "market" for attorneys' fees under federal fee-shifting statutes would be reflected in the federal judiciary itself—in a manner analogous to a stock exchange—rather than by an attempt to replicate the operation of contingent-fee contracts freely entered into between willing clients and willing attorneys in private-law matters: litigants before the federal trial courts would determine the "going rate" by negotiation in light of earlier awards of attorneys' fees, and the district and appellate courts would determine the "going rate" when the parties could not agree. Such a flexible notion of the relevant "market" is appropriate to this calculation, in light of the concurrence's acknowledgment that it would be impossible to mimic the model of contingent-fee practice in the private market.

C. That the district court heard various contingent-fee attorneys and law-practice economists testify about their fee-setting practices and those they believed to be common in the Kansas City area and throughout the nation, and subsequently found that its lodestar rates for Mr. Benson and his staff adequately compensated him for the risk of nonpayment in the underlying case, provides a sufficient basis for leaving undisturbed the judgment of the district court and the opinion of the court of appeals in respect to the denial of a separate contingency enhancement.

In its evidentiary hearing of February 27, 1987, the district court heard testimony from Kansas City attorneys who handle plaintiffs' cases on a contingent-fee basis, as well as from "the leading civil rights private practitioner in Iowa" and two economists, concerning the amount by which the private market recognizes risk of nonrecovery and consequent nonpayment under contingent-fee contracts. Petition at 12-13, 14-16 (citing transcript). Consequently, the plaintiffs had—and exercised—the opportunity to put on the very kind of evidence that would be relevant to the district court's determination of the fees for Mr. Benson and his staff under the reading of the *Delaware Valley II* concurrence which is most favorable to them.

Both initially, without the benefit of this Court's opinions in *Delaware Valley II*, and on the plaintiffs' motion for reconsideration—which was overruled *after* the announcement of the latter decision—the district court which had heard the underlying case declined to enhance Mr. Benson's fees above and beyond the enhancement re-

flected in its lodestar calculation. Consequently, Mr. Benson has not been prejudiced by the unique intervention in time of the *Delaware Valley II* decision between the fees hearing and initial order on the one hand and the motion to reconsider, the order denying it, and the fees litigation in the court of appeals, on the other.

II. Petitioners exaggerate the uncertainty, if any, created by this Court's Delaware Valley II **decision in respect to the means by which risk of nonpayment may be considered, in appropriate cases, in setting statutory attorneys' fees for prevailing parties.**

Petitioners contend that there is a conflict among the circuits concerning the propriety of a district court's considering the risks of nonrecovery in the particular case before it when evaluating a prevailing party's claim for a contingency enhancement under a federal fee-shifting statute. Petition at 38-41.

A. Assuming arguendo the existence of any conflict between certain circuits concerning the issue on which the petitioners seek a writ of certiorari, this case would not provide an appropriate vehicle for "resolving" the alleged differences, because the court of appeals panel that heard their appeal and affirmed the judgment of the district court was in one of the circuits whose general position on this issue the petitioners endorse.

First of all, even assuming that such a conflict existed, the petitioners themselves have not been prejudiced there-

by, because they include the Eighth Circuit—which decided their case—as one of the six (6) that have adopted a reading of the *Delaware Valley II* opinion substantially consistent with theirs on the issue whether the relevance of the "legal" risk of nonrecovery per se in a particular case. Petition at 34, 40-41. Indeed, in its opinion, the court of appeals made explicit its reliance on Justice O'Connor's concurrence as stating the views of a majority of the Court, and that this majority "disapproved enhancement decisions based on 'legal risks' peculiar to a particular case." Pet. App. 39a-40a.

Petitioners are in the unique position of having received less than they desire in attorneys' fees in an order of the district court issued shortly before this Court's *Delaware Valley II* decision, which order was reaffirmed in a subsequent order issued shortly after that decision. Although the court of appeals took account of *Delaware Valley II* and agreed with the petitioners concerning the issue on which they allege there to be conflict among the circuits, the petitioners disagree with the court of appeals' resolution of the factual question whether they "would have faced substantial difficulties in finding counsel in the local or other relevant market." 107 S.Ct. at 3089 (O'Connor, J., concurring in part and concurring in the judgment).

Any alleged conflict among the circuits is therefore beside the point. Even if there were a conflict, and this Court were to resolve it in the manner urged by the petitioners, the result in this case would be the same.

B. The cases cited by the petitioners as evidence of a conflict among the circuits on this issue do not in fact reflect conflicts between decisions, only a variety in the expression of the rationales of the "minority" courts of appeals, as well as differences of fact between the cases decided by them after this Court's decision in Delaware Valley II.

In arguing that there is "Confusion And Conflict Among The Circuits" on the propriety of considering the prevailing party's likelihood of success on the merits at any stage in the decision whether to award an enhanced fee to compensate counsel for assuming the risk of nonrecovery and nonpayment, the petitioners rely on three (3) decisions subsequent to *Delaware Valley II* as creating a conflict by not identifying the position of Justice O'Connor as reflecting a majority of the Court on this issue. Whereas the Third, Fourth, Fifth, Eighth, District of Columbia, and Federal Circuits interpret the decision as relying on the criteria articulated by Justice O'Connor in concurrence, Pet. App. 34, the petitioners say that the First, Second, and Sixth Circuits "take a different tack," and "have not adopted Justice O'Connor's standard [but] have continued to base post-*Delaware Valley II* contingency enhancement decisions in part on their evaluation of the particular risks posed by the case, Pet. App. 39. Following this assertion is a string citation of one decision from each of the allegedly errant circuits, on the basis of which the petitioners urge this Court to exercise its certiorari jurisdiction to resolve this horrendous conflict.

A reading of the three cases indicates that there is no conflict between these three decisions, on the one

hand, and the position of the Eighth Circuit in general or its resolution of the issue on which the petitioners seek certiorari, on the other. The earliest of these decisions is *Jacobs v. Mancuso*, 825 F.2d 559 (1st Cir. 1987). It was decided on July 24, 1987—less than one month after *Delaware Valley II*. In Jacobs, the First Circuit did not ignore this Court's decision, however, but distinguished it, by pointing out that in the underlying case before it, there was no basis for a contingency multiplier. Respondents do not understand the petitioners to contend that prevailing parties' attorneys are always entitled to a "contingency enhancement" even in the absence of contingency. In the part of the *Jacobs* opinion that appears to trouble the petitioners, however, the First Circuit says nothing more remarkable than that:

> From the standpoint of contingency, liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated. *Cf. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ... U.S. ....., 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987).

Id. at 561. By using the signal "Cf.," the court of appeals indicated that *Delaware Valley II* "supports a proposition different from the main proposition but sufficiently analogous to lend support." Harvard Law Review Association, A Uniform System of Citation 9 (14th ed. 1986). Here, the proposition for which *Delaware Valley II* stands is that a prevailing party's attorney may be entitled to some enhancement *if* there was a risk of nonrecovery, as further articulated by this Court. That was "different from" the situation before the First Circuit in *Jacobs*, where the district court had found that there

was *no* practical risk of nonrecovery, and hence, no contingency.

Jacobs is not in conflict with the "majority" decisions—including the Eighth Circuit's denying the petitioners' local attorney an extra $1.7 million for a partial success—because it does not clash with the proposition for which the petitioners cited the other six circuits' opinions. It is simply beside the point. One may agree with all six of these circuits' opinions on how to measure a contingency enhancement while maintaining that an attorney is not entitled to such an enhancement in a case where no contingency was present.

Next, the petitioners cite *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987). This case was, like *Delaware Valley II* itself, an environmental case; counsel were seeking fees under 33 U.S.C. § 1365(d). In *Friends of the Earth*, the Second Circuit applied *Delaware Valley II* to deny a contingency enhancement on the ground that "it does not appear that a bonus was necessary to attract competent counsel." *Id.* at 298. It explained the linkage between the risk of nonrecovery and the difficulty vel non of attracting counsel by citing one of its earlier decisions, *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986). In *Lewis* it had said, "the rationale that should guide the court's discretion is whether '[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts.'" It noted that "[t]his position is similar to that taken by the plurality and Justice O'Connor" in *Delaware Valley II*. 834 F.2d at 298. This decision is indeed in harmony with *Delaware*

Valley II—having been cited by the plurality on this very point, with which Justice O'Connor explicitly concurred, 107 S.Ct. at 3089 & n.12 (plurality opinion), 3091 (concurring in part and concurring in the judgment)—and with the "majority" circuits identified in the Petition.

Finally, the petitioners cite *Conklin v. Lovely*, 834 F.2d 543 (6th Cir. 1987). In *Conklin*, the Sixth Circuit set forth the respective positions of the Members of this Court in *Delaware Valley II*, and remanded the case before it for "specific factual findings" in light of its opinion. *Id.* at 553. Petitioners seem to find *Conklin* offensive in that it also cited and quoted at length from another Sixth Circuit opinion, *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), which—like *Jacobs v. Mancuso*—had the temerity to suggest that there are some cases so strong that the attorney who takes them has not assumed the risk for which contingency enhancements exist to compensate counsel. 611 F.2d at 638.

Such a suggestion is not in conflict with the decisions of the other six circuits, unless they are to be interpreted to read "contingency" out of "contingency adjustment," and to mandate an automatic bonus for attorneys who take cases for which Congress has provided that attorneys' fees may be available. But that position would be absurd. It is certainly not the one taken by the Eighth Circuit in the instant case or by this Court in *Delaware Valley II*. Petitioners may find *Conklin* less than a full-throated expression of their deepest jurisprudential longings, but it is not in conflict with the position they attribute to the six circuits with which they align themselves on the proper construction of *Delaware Valley II*. Petition at 39-40.

None of the three cases cited as creating a conflict among the circuits—nor the group of three in the aggregate—comes close to doing so. Petitioners' claim of "confusion" merely reflects the differences between fact-situations arising before the panels that have applied *Delaware Valley II*. Petitioners have utterly failed to demonstrate the existence of a conflict at all, let alone one that would be resolved by a re-examination of their local counsel's claim for an additional $1.7 million over and above the $1.7 million already awarded him.

CONCLUSION

Wherefore, the petition of the plaintiffs below for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
TERRY C. ALLEN
Deputy Attorney General
MICHAEL L. BOICOURT
(Counsel of Record)
Assistant Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
314-751-3321
Counsel for Respondents